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No. 74-1486

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

CALMAN BERNSTEIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is to advise the Court of recent developments in two cases related to the government's petition for a writ of certiorari in this case.

1. In our petition (p. 7, n. 5) we noted that the decision of the Fourth Circuit in this case conflicted with that of a panel of the Fifth Circuit in *United States* v. *Doolittle*, 507 F.2d 1368. However, because *Doolittle* was then pending before the Fifth Circuit on rehearing *en banc*, we did not contend that re-

view by this Court was necessary to resolve an established conflict among the circuits. However, on September 2, 1975, the *en banc* Fifth Circuit affirmed the convictions in *Doolittle* on the basis of the panel opinion (see App. A, *infra*). The majority of the panel had originally held (App. B, *infra*), on facts similar to those in the instant case, that a failure to identify known persons in a wire interception application would not result in suppression of evidence where there was substantial compliance with Title III, no prejudice to unnamed persons, and no evidence of government bad faith. Neither the panel nor the court *en banc* discussed the serious practical question of who must be identified in an intercept application. (But see Judge Godbold's dissent, App. A, *infra*, pp. 7a-9a.) Hence, there is now an established conflict in the circuits on the question whether suppression is required for an innocent failure to identify a known person. Moreover, guidance from this Court is still required on the question of the scope of the identification requirement of 18 U.S.C. 2518(1)(b)(iv).

2. Our petition for certiorari in *United States* v. *Donovan*, No. 75-212, raises, *inter alia*, the same issues presented here. In that petition we noted (p. 8, n. 4) that the District of Columbia Circuit had followed the holding of the court below in *United States* v. *Moore*, 513 F.2d 485, 492-494, and that our petition for rehearing *en banc* was then pending. That petition was denied on July 28, 1975. However, on September 9, 1975, the court granted the govern-

ment's motions to recall and stay reissuance of the mandate pending this Court's disposition of the instant case.

3. We pointed out in our *Donovan* petition (pp. 18-19) that *Donovan* presents not only the issues involved in this case but also other issues important to the implementation of Title III. Accordingly, we suggested that this Court may wish to consider hearing *Donovan* plenarily, rather than this case. For the same reason, the Court may wish to consider both petitions for certiorari together, since it may prefer to grant *Donovan* and hold this petition for appropriate disposition in light of its decision in *Donovan*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 72-3263

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

BILLY CECIL DOOLITTLE, WILLIAM AUGUSTUS SANDERS, JR., ERNEST MASSOD UNION, JULIAN WELLS WHITED, FRANK JOSEPH MASTERANA, CLIFF ANDERSON, DARNICE T. MALLOWAY, AND WILLIAM E. BAXTER, DEFENDANTS-APPELLANTS

Sept. 2, 1975

Appeals from the United States District Court for the Middle District of Georgia. William A. Bootle, Judge, 341 F.Supp. 163.

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLDMAN, GOLDBERG, AINSWORTH, GODSBOLD, DYER, SIMPSON, CLARK, RONEY and GEE, Circuit Judges.*

PER CURIAM.

The Court voted to reconsider this case *en banc* primarily to determine the correctness of the issue on which the panel divided: whether the failure to name defendants Anderson, Baxter and Sanders in the

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* Circuit Judge Morgan did not participate in the decision of this case.

wiretap interception order required suppression in their trials of intercepted telephone conversations to which they were parties. A majority of the en banc court agrees with the panel's resolution of the issue and the convictions of Anderson, Baxter and Sanders are affirmed on the basis of the panel opinion. *United States* v. *Doolittle*, 507 F.2d 1368 (5th Cir. 1975). Having considered all issues in the case, the Court agrees that the panel correctly decided the issues on which the panel was itself unanimous.

Affirmed.

BROWN, Chief Judge, and WISDOM, THORNBERRY, GOLDBERG and SIMPSON, Circuit Judges, dissent from the affirmance of the convictions of Anderson, Baxter and Sanders, and would reverse for the reasons stated in Judge Thornberry's dissent to the panel decision. 507 F.2d at 1372. *Cf. United States* v. *Bernstein*, 509 F.2d 996 (4th Cir. 1975), *petition for cert. filed*, 43 U.S. L.W. 3637 (U.S. May 27, 1975) (No. 74-1486).

GODBOLD, Circuit Judge (dissenting):

The problem presented is whom must the government name in its applications for wiretap orders under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. The pertinent section requires the government to state in its application for a wiretap order "the identity of the person, if known, committing the offense and whose communications are to be intercepted . . .," § 2518(1)

(b)(iv). The court order must state the "identity of the person if known, whose communications are to be intercepted . . .," § 2518(4)(a).[1] Defendants contend that the government must name every person who it has probable cause to believe is committing the crime being investigated. The Fourth and Sixth Circuits have adopted that view. *United States* v. *Bernstein*, 509 F.2d 996 (CA4, 1975); *United States* v. *Donovan*, 513 F.2d 337 (CA6, 1975). The government contends, in effect, that so long as it gives the name of one person with respect to whom it has probable cause it need not reveal the names of others with respect to whom probable cause is also present.

Neither approach to the government's obligation is workable. The defendants' view is too expansive. A single wiretap may produce dozens if not hundreds of names of individuals not seriously under investigation but with respect to whom the existence of probable cause might be found. The probable cause approach would stifle if not smother the law enforcement efforts of government agencies with administrative labors. I think Congress did not intend such a result.

The government's view is too narrow. Congress did not intend to permit the government to name whomever it chooses and no others. The thrust of the wiretap statute is judicial supervision of neces-

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[1] The insignificance of the discrepancy between the language relating to wiretap applications and that relating to wiretap orders is discussed in *United States* v. *Kahn*, 415 U.S. 143, 152, 94 S.Ct. 977, 982, 39 L.Ed.2d 225, 235 (1974).

sary executive invasions of privacy. Such supervision can only serve its function where the supervising court has sufficient access to the information needed for due consideration of wiretap applications. In these *ex parte* proceedings the government is the only source of information. An interpretation that requires the government agency to name only one person when it is actively directing the interception against many more persons reads the naming requirement out of the Act and shifts the locus of informed decision-making from the courts to the agencies. This is contrary to the intent of Congress.

The majority panel decision, adopted by the en banc majority, does not decide whether there was or was not probable cause with respect to Anderson, Baxter and Sanders. Judge Thornberry pointed out in his dissent to the panel opinion that it did not come to grips with this question. Rather, the panel opinion appears to say that, even if there was probable cause with respect to these defendants, the governmental action is nonetheless salvaged by an amalgam of substantial compliance with the statute, no prejudice to the defendants, and no bad faith or subterfuge by the government I have great difficulty with this cure by analgesic balm. The statutory scheme recognizes the privacy interest of one using telephone communications and makes wiretapping a felony except for statutorily prescribed exceptions, 18 U.S.C. § 2511(1). I think none of these grounds is adequate to overcome the policies inhering

in the congressional determination to prohibit and severely punish unauthorized wiretapping, §§ 2511 (1) and 2520.

Construing after-the-fact performance of the requirement of § 2518(8)(d) as substantial compliance misses the thrust of the statute, which is not disclosure to the victim after the fact but review by a federal district judge before the fact. What is missing from the government's proffered compliance is the federal district judge's review of the wiretap plans to protect the privacy interest of the unnamed persons. This is the heart of the statutory scheme. When the person is not named the further disclosure requirements of § 2518(1)(e) are also not triggered and judicial supervision becomes a charade.[2]

Even if that right is discounted, reliance upon after-the-fact compliance with the requirements of § 2518(8)(d) as substantial compliance with the statutory scheme renders the application and order requirements nugatory. If the government need not name a suspect so long as he is given after-the-fact notice and transcripts, then the government need never disclose names in the original application, for it could always give retrospective validity to its actions by sending notice and transcript to whomever it later chooses to prosecute. Without names the

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[2] No court is empowered to consider after the fact whether the wiretap was proper in terms of balancing the conflicting interests of privacy and law enforcement, as the application court is empowered to do under § 2518(4), discussed *infra*. Thus the necessity for proper and informed decision on that question before the fact looms larger in significance.

courts will be seriously disabled in their function of reviewing the applications for probable cause and considering other relevant factors under § 2518(3). The limiting and deterrent features of the statute would be lost. Congress surely did not intend to allow this.

Except to the extent, if at all, that there may be substantial rather than literal compliance with the statute, the statutory scheme does not allow a "no prejudice" or "error without injury" approach. The statute recognizes the right of privacy of one using telephone communications and makes wiretapping a felony except for statutorily prescribed exceptions, 18 U.S.C. §§ 2511(1)(a) and (b) and 2518. One whose privacy has been invaded by an action felonious if not excepted by statute may not be denied suppression on the ground that he really has not been hurt very much.

With respect to good faith, a governmental pure heart does not validate an otherwise invalid wiretap any more than it would a private person's erroneous but good faith belief in the legality of his wiretap of a neighbor or competitor. Even if the government is to be given greater deference, I have difficulty understanding what constitutes good faith in this context.[3] It is obvious that if the government is not required to name a person with respect to whom it has probable cause, then it does not act in bad faith in not naming him. As employed by the majority the phrase "good faith," amorphous and undefined, is not a tool of analysis but merely a palliative. It has no relevance to whether the function of the statute —judicial supervision of executive invasions of individual privacy—has been served.

[3] This is wholly different from the good faith referred to in § 2520, which goes to reliance on a district judge's order, a specific and well-defined concept of good faith unlike that offered by the majority here. Moreover, the good faith there protects government employees from severe after-the-fact sanctions for human errors to which their work particularly exposes them; here it is being used to undercut the before-the-fact protections sought to be provided by the statute. Taken together they empower the very abuses, under color of law and protected from punishment, which this act was designed to prevent.

Since I reject the arguments by which the majority resolve this case, I must consider the question of what triggers the naming requirement of § 2518(1)(b)(iv). Originally I thought that I would join my fellow dissenters, who have taken a stand on *United States* v. *Kahn*, 415 U.S. at 155, 94 S.Ct. at 984, 39 L.Ed.2d at 237, and *United States* v. *Bernstein*, 509 F.2d at 1001-1002.[3a] See the dissent from the panel opinion, 507 F.2d 1368, 1372, 1373, adopted by the en banc minority. On further reflection I have concluded that I cannot join them in that position. At the most *Kahn* only says that if the government does not have probable cause to believe a person is committing the crime being investigated then the government need not name that person under § 2518(1)(b)(iv),[4] 415 U.S. at 155, 94 S.Ct. at 984, 39 L.Ed.

[3a] *See also United States* v. *Donovan*, 513 F.2d at 341.

[4] I think that § 2518(3) poses a distinct naming requirement, *see infra*.

2d at 237. I do not read this to decide the converse proposition that if the government does have probable cause it must name the person. We must then look to the statute to determine whether Congress indicated more definitely whom it wanted named in wiretap applications.

Steering between the Scylla of a stifling administrative burden and the Charybdis of unchecked executive power, I would require the government to name all those individuals "against whom the interception was directed," as that phrase is used in the definition of aggrieved person in § 2510(11).[5] This definition is keyed to the standing and substantive rights given in § 2518(10)(a) and reflecting a congressional concern for protecting the interests of those subjected to government investigations.

I do not see how the naming requirement can be any narrower.[6] As I have already pointed out, to permit the government to conduct an investigation by wiretapping without ever disclosing to a court the persons it hopes to hear and ultimately convict makes mincemeat of the statutory system. This could subject to intentional, repeated, unsupervised and un-

[5] The important details of who must carry exactly what burden of proof must be left to the district courts to work out through practical experience.

[6] Whatever bearing some of the language in *Kahn* may have on this point, I think it is sufficient to say that the individual in that case whose conversation was overheard was not under investigation and that the government made a convincing showing to that effect.

punishable[7] invasions of privacy any person who talks by telephone with persons—only one per wiretap would be necessary under the majority's approach—against whom the government is able to make some showing of probable cause. The essence of the § 2518(1)(e) requirement of disclosure to the application court of prior wiretaps is to prevent such activity. It cannot be prevented unless the government is required to apprise that court of the identity of the persons at whom investigation and wiretap are directed.[8]

If one is to move toward a broader reading of the naming requirement, I see no stopping point short of probable cause. For the reasons noted above I think such a requirement would be too broad because of the administrative burdens it would place on law enforcement agencies.

The approach which I have taken meshes neatly with the application-and-order procedure under which all wiretaps are to be conducted. The statute posits that courts should supervise law enforcement agencies' wiretap activities. Wiretaps are of course a powerful investigative tool, but the concomitant in-

[7] By reason of § 2520.

[8] The target-naming requirement would cut off more severe abuses, by judicial supervision where the persons are named, and by the sanctions of §§ 2511(1) and 2520 where they are not named. The good faith defense provided in § 2520 would be unavailable where the naming requirement is clear and the failure to name is egregious, notwithstanding the presence of a § 2518(3) order.

vasions of privacy necessarily occurring must be weighed against the investigative convenience. The ultimate decision-maker is the federal district court. Judicial supervision of wiretapping begins when a law enforcement agency applies to a court for a wiretap order. Section 2518(1) requires the application to disclose authorization for the application under §§ 2516(1) or (2), the phone to be tapped, the crime believed to be committed, the name of the suspect, a statement that other investigative means have been exhausted or would not be productive, and prior wiretaps of the persons named. The next subsection authorizes the judge to "require the applicant to furnish additional testimony or documentary evidence in support of the application," § 2518(2). The judge who must weigh the competing values of privacy and efficient law enforcement is thus empowered to obtain information pertinent to those factors from the only party before it in these *ex parte* proceedings. The separate authorization of § 2518(2) would be redundant and superfluous if it reached no more than is already covered by § 2518(1)(b), since the judge could always refuse to issue an order until the law enforcement agency had satisfactorily complied with that subsection.

Section 2518(2) is an invitation to the judge receiving the application to plumb the scope and purpose of the government's investigation. It authorizes him to inquire into whatever other purposes the government agency might have, into possible and sus-

pected wrongdoers not yet the subject of probable cause beliefs, and into other collateral matters which, although not required by the bare application requirements of § 2518(1)(b), the court might consider in deciding whether to grant the order.

The judge's duty to weigh these collateral and competing factors is contained in the next subsection, § 2518(3), which does not require, but only authorizes, issuance of a wiretap order after the appropriate findings of probable cause—"the judge *may* enter an ex parte order . . . if the judge determines on the basis of the facts submitted by the applicant that . . . there is probable cause for belief that an individual is committing . . . a particular offense" and that a wiretap will disclose pertinent communications, along with other necessary findings (emphasis added).[9] The judge has discretion not to issue a wiretap order even if he is satisfied that a showing of probable cause has been made. The authorization to require additional information in § 2518(2) read in conjunction with this discretion suggests a broad grant of power to the courts to oversee governmental wiretapping.

In the instant case, I would remand to the District Court for a hearing on whether Anderson, Baxter and Sanders were targets of the government's

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[9] Compare § 2518(10)(a), which refers to a presumption of illegality "if the motion [to suppress] is granted . . ." The conditional "if" here could go to a finding of grounds for suppression, as well as to judicial discretion. But there is no such ambiguity in § 2518(3), which must include discretion.

investigation when the relevant wiretap application was made, that is, whether the wiretaps were directed against them, taking due account of whether the government can reasonably be believed not to be investigating these persons in light of the information it had already collected against them.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 72-3263

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

BILLY CECIL DOOLITTLE, WILLIAM AUGUSTUS SANDERS, JR., ERNEST MASSOD UNION, JULIAN WELLS WHITED, FRANK JOSEPH MASTERANA, CLIFF ANDERSON, DARNICE T. MALLOWAY, AND WILLIAM E. BAXTER, DEFENDANTS-APPELLANTS

Feb. 14, 1975

* * * *

Floyd M. Buford, Macon, Ga., for Union and Whited.

Oscar B. Goodman, Las Vegas, Nev., for Doolittle, Sanders and Masterana.

Louis Weiner, Jr., Las Vegas, Nev., Manley F. Brown, Macon, Ga., for Anderson.

Wesley R. Asinof, Atlanta, Ga., for Malloway and Baxter.

William J. Schloth, U.S. Atty., Charles T. Erion, Asst. U.S. Atty., Macon, Ga., for plaintiff-appellee.

Appeals from the United States District Court for the Middle District of Georgia.

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

RONEY, Circuit Judge:

All defendants were convicted in a non-jury trial for conspiracy to violate 18 U.S.C.A. §§ 1084 and 1952, which prohibit the use of interstate wire and telephone facilities to carry on illegal gambling operations. All defendants were similarly convicted of substantive violation of § 1952, and defendants Masterana and Doolittle were also convicted of substantive violations of § 1084. The convictions were obtained primarily by the use of conversations intercepted by a wiretap authorized by the district court under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §§ 2510-2520, and the fruits of searches for which the wiretap provided probable cause. Recognizing that without this evidence the Government's case would be substantially weakened, if not destroyed, defendants mounted a multi-faceted assault on the wiretap in a motion to suppress the evidence in the district court. The district court denied the motion, and the convictions followed. The attack has been renewed in this Court, but like the district court, we find no infirmity warranting suppression of the evidence and affirm all convictions.

[1] Defendants first attack the wiretap provisions of the Omnibus Crime Control Act as unconstitutional for violations of the First, Fourth, Fifth and Sixth Amendments. We have recently upheld this portion of the statute against a similar constitutional attack. United States v. Sklaroff, 506 F.2d 837 (5th Cir. 1975).

[2] Next the defendants assert that various procedural irregularities in the authorization of the wiretap request within the Justice Department require that the evidence be suppressed. *See* 18 U.S.C.A. § 2515. The Supreme Court of the United States has ruled that irregularities of the kind asserted here do not render the communications "unlawfully intercepted" or the interception request "insufficient on its face." United States v. Chavez, 416 U.S. 562, 94 S.Ct. 1849, 40 L.Ed.2d 380 (1974); *see* 18 U.S.C.A. §§ 2518(10)(a)(i), 2518(10)(a)(ii). At the time this case was argued, the Supreme Court had not decided *Chavez* and appellants relied on the Ninth Circuit decision in that case. United States v. Chavez, 478 F.2d 512 (9th Cir. 1973). The Supreme Court modified that portion of the Ninth Circuit decision upon which the appellants relied. We find nothing in this case to warrant a different result than that determined by the Supreme Court in *Chavez*. Considering the other information contained in the Interception Order Authorization, such as the location of the phones to be tapped, address of the Sportsman's Club, and its owner, we find the one incorrect digit in one of the four telephone numbers listed therein to be an immaterial variation from the actual, correct number for which the tap was requested of the district court. *Cf.* United States v. Chavez, *supra*.

[3] The procedure of filing the affidavits of the Attorney General and his subordinates, as a method of proving the administrative history of the specific

authorization in this case, is identical to that used in *Chavez*. There is no constitutional infirmity in the district court's refusal to require more of the Attorney General on this narrow issue of fact.

[4] Appellants contend that the use of a "pen register," as in this case, is not specifically authorized by Title III and must, therefore, be considered rejected by Congress as an appropriate investigative tool. The Act does not prohibit the use of pen registers and we do not view its use in this case, based upon probable cause and with a separate authorization from the district court, as being constitutionally offensive. *See* United States v. Giordano, 416 U.S. 505, 553-554, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974) (Powell, joined by the Chief Justice, and Blackmun and Rehnquist, JJ., concurring in part and dissenting in part); United States v. Finn, 502 F.2d 938 (7th Cir. 1974); United States v. Brick, 502 F.2d 219, 223 (8th Cir. 1974); *cf.* United States v. Falcone, 364 F.Supp. 877 (D.N. J. 1973), aff'd, 500 F.2d 1401 (3rd Cir. 1974).

[5, 6] Certain defendants assert that the Government lacked probable cause to believe that their conversations would be intercepted by the wiretap. They contend that this lack of probable cause should render the tap unlawful as to them. A similar argument has been rejected by the Supreme Court in United States v. Kahn, 415 U.S. 143, 94 S.Ct. 977, 39 L.Ed.2d 225 (1974). At oral argument, the appellants relied upon the Seventh Circuit decision in United States v. Kahn, 471 F.2d 191 (7th Cir.

1972). The reversal by the Supreme Court of the Seventh Circuit decision is dispositive of the issue as framed here. The statute does not require that there be probable cause as to all persons whose conversations are intercepted. *See* 18 U.S.C.A. § 2518 (1)(b)(iv). Since the wiretap in this case was validly issued, the wiretap conversations of those individuals not known to be involved in criminal activity at the time of the court authorization may be used against them.

[7] The wiretap authorization referred to "Billy Cecil Doolittle and others as yet unknown." Anderson and Baxter contend that the Government had reasonable cause to believe that their conversations would be intercepted. Relying on certain language in the Supreme Court's opinion in *Kahn*, they argue that, not being "unknown," they should have been named in the authorization. They contend that since they were not named, the wiretap order was illegal as to their conversations. The same argument could be made for Sanders. We reject this argument. The defendants neither allege nor demonstrate any prejudice to them in not being named in the authorization. The Government contends that its agents had personal knowledge, as opposed to information, to support probable cause as to illegal activity only of Doolittle, the co-owner of the Sportsman's Club, the establishment wherein the telephones were located and to which the telephone bills were sent. All defendants received an inventory of the intercepted conversations, were allowed to listen to the tapes

and received transcripts of the conversations prior to use against them at trial, as if they had been named in the order. Most of the conversations of each defendant were with Doolittle, the person named in the order. There is no indication of bad faith or attempted subterfuge by the Government in its wiretap application. The application and affidavit delineated specifically the information expected to be gathered from the tap. We hold there was substantial compliance with the requirements of the Act, and that the failure to name other defendants does not render the evidence obtained as to them inadmissible under 18 U.S.C.A. § 2518(10)(a).

[8] The last general attack by all defendants is that the wiretaps exceeded the scope of the interceptions authorized by the court order. The testimony by the monitoring agent at the suppression hearing reveals that they listened to each call only long enough to determine whether in their judgment it could be one dealing with gambling as authorized to be intercepted by the district court. Only those calls which the agents reasonably believed were related to gambling were recorded on tape. There is no question that some irrelevant and personal portions of gambling conversations were intercepted or that certain nonpertinent conversations were intercepted. But this is inherent in the type of interception authorized by Title III, and we do not view the simple inclusion of such conversations, without more, as vitiating an otherwise valid wiretap. The procedure testified to by the agents appears a reasonable method for complying with the order of the district court, in accord with the statutory mandate that the interception be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Title III. United States v. Cox, 462 F.2d 1293 (8th Cir. 1972), cert. denied, 417 U.S. 918, 94 S.Ct. 2623, 41 L.Ed.2d 223 (1974).

[9] The district court specifically found that defendants Malloway and Baxter lacked actual knowledge of the use of interstate facilities in the gambling operation. This lack of specific knowledge is legally irrelevant. The words of § 1952 do not require specific knowledge of the use of interstate facilities and we agree with the decisions in other Circuits that such knowledge is not a prerequisite to criminal liability thereunder. *See, e. g.*, United States v. Roselli, 432 F.2d 879 (9th Cir. 1970), cert. denied, 401 U.S. 924, 91 S.Ct. 883, 27 L.Ed.2d 828 (1971); United States v. Hanon, 428 F.2d 101 (8th Cir. 1970), cert. denied, 402 U.S. 952, 91 S.Ct. 1608, 29 L.Ed.2d 122 (1971); United States v. Miller, 379 F.2d 483 (7th Cir.), cert. denied, 389 U.S. 930, 88 S.Ct. 291, 19 L.Ed.2d 281 (1967).

[10] Anderson individually challenges the district court's handling of his evidentiary objection to certain of the intercepted conversations as hearsay. The trial court's rulings on this matter shows a clear understanding of the law on the exception to the hearsay rule which applies to statements made by co-conspirators in furtherance of the conspiracy. *See,*

e. g., United States v. Register, 496 F.2d 1072, 1078-1079 (5th Cir. 1974); United States v. Williamson, 482 F.2d 508, 513 (5th Cir. 1973). An examination of the record shows sufficient independent evidence of the existence of a conspiracy to which Anderson was a party to warrant the introduction of the hearsay conversations against him.

Affirmed.

THORNBERRY, Circuit Judge (concurring in part and dissenting in part):

I concur in the decision affirming the convictions of Doolittle, Malloway, and Masterana. With regard to appellants Anderson, Baxter, and Sanders, however, I would reverse; hence I respectfully dissent from so much of the majority opinion as affirms their convictions.

I do so not without reluctance, for the majority admirably attempts to demonstrate that the latter defendants were not prejudiced by the procedure under which their intercepted telephone communications were used against them at trial. That is while these defendants enjoyed along with every member of the public a Congressionally-recognized interest in individual privacy, their interest must be balanced against the government's interest in enforcing laws relating to the crimes enumerated in 18 U.S.C. § 2516(1)(a)-(g). Under the circumstances of this case, these defendants having obtained inventories

and access to the evidence, the majority necessarily reasons that the governmental interest must prevail.

If the choice were ours to make, I probably would not quarrel with the majority's conclusions that "there was substantial compliance with the requirements of [Title III]," and, consequently, no requirement of suppression as to Anderson, Baxter, and Sanders due to the failure of the government and the district court to name them in either the wiretap application or the resulting order. The controlling issue of statutory construction, however—an issue with which the majority does not come to grips—has already been decided rather clearly by the Supreme Court. It is in the application of the Court's rule of statutory construction[1] to the facts that I find myself in basic disagreement with the majority.

In United States v. Kahn, 415 U.S. 143, 155, 94 S.Ct. 977, 984, 39 L.Ed.2d 225, 237 (1974), the square holding is as follows:

> We conclude, therefore, that Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe

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[1] The pertinent provisions of 18 U.S.C. § 2518 are:

(1) (b) (iv)—"Each application shall include the following information: . . . the identity of the person, if known, committing the offense and whose communications are to be intercepted. . . ."

(4) (a)—"Each order authorizing or approving the interception of any wire or oral communication shall specify—the identity of the person, if known, whose communications are to be intercepted . . ."

> that the individual is "committing the offense" for which the wiretap is sought. Since it is undisputed that the Government had no reason to suspect Minnie Kahn of complicity in the gambling business before the wire interceptions here began, it follows that under the statute she was among the class of persons "as yet unknown" covered by Judge Campbell's order.

Having so held, the Court proceeded to reverse the Seventh Circuit, which had ordered Minnie Kahn's gambling-related telephone conversations suppressed, albeit for reasons more onerous to the government than the test announced by the Supreme Court.

Perhaps apprehensive about its quick dismissal of *Kahn* in this case, the majority somehow divines a contention by the government that probable cause to suspect participation "in the gambling business" existed only as to Doolittle at the time when wiretap authorization was sought. The majority suggests that this absence of probable cause as to the "others as yet unknown" may have resulted from government possession of mere hearsay information, rather than personal observation by investigating agents, concerning the behavior of these "others." Such a dichotomy, if seriously advanced, could indeed effect a major formulation of the law of probable cause. *See* Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); Draper v. United States, 358 U.S. 307, 311, 79 S.Ct. 329, 332, 3 L.Ed.2d 327, 331 (1959); Gonzales v.

Beto, 5th Cir. 1970, 425 F.2d 963, 968-970, cert. denied, 400 U.S. 928, 91 S.Ct. 194, 27 L.Ed.2d 189 (1970). Nor do I understand the majority to suggest that "probable cause" as to a given individual or telephone number connotes a more demanding standard when wiretaps are used by contrast to other types of searches. Again such a suggestion would, in my view, be erroneous. *See* United States v. Falcone, 3rd Cir. 1974, 505 F.2d 478, 481, United States v. Finn, 7th Cir. 1974, 502 F.2d 938, 941. The question with which I shall attempt to deal, then, is whether at the time when wiretap authorization was sought, the government had probable cause to suspect that Anderson, Baxter, and Sanders were conspiring with or assisting Doolittle in illegal gambling involving the use of the telephone at the Sportman's Club. For reference, reproduced in the margin [2] are the

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[2]

APPLICATION

(Number and Title Omitted)

Charles T. Erion, an Assistant United States Attorney, Middle District of Georgia, being duly sworn states:

This sworn application is submitted in support of an order authorizing the interception of wire communications. This application has been submitted only after lengthy discussion concerning the necessity for such an application with various officials of the Organized Crime and Racketeering Section, United States Department of Justice, Washington, D. C., together with Agents of the Federal Bureau of Investigation.

1. He is an "investigative or law enforcement officer—of the United States" within the meaning of Section 2510(7) of Title 18, United States Code, that is—he is an attorney authorized by law to prosecute or participate in the prosecution

of offenses enumerated in Section 2516 of Title 18, United States Code.

2. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, to authorize affiant to make this application for an order authorizing the interception of wire comcunications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.

[516] 3. This application seeks authorization to intercept wire communications of Billy Cecil Doolittle and others as yet unknown concerning offenses enumerated in Section 2516 of Title 18, United States Code, that is—offenses involving the transmission, by means of an interstate wire facility, of gambling and wagering information by a person engaged in the business of gambling, in violation of Title 18, United States Code, Section 1084, and the use of interstate telephone communication facilities for the transmission of betting information in aid of a racketeering enterprise (gambling), in violation of Section 1952 of Title 18, United States Code, and a conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code, which have been committed and are being committed by Billy Cecil Doolittle and others as yet unknown.

4. He has discussed all the circumstances of the above offenses with Special Agent Gary W. Hart of the Macon, Georgia office of the Federal Bureau of Investigation who has directed and conducted the investigation herein, and has examined the affidavit of Special Agent Hart (attached to this application as Exhibit B and incorporated by reference herein) which alleges the facts therein in order to show that:

(a) there is probable cause to believe that Billy Cecil Doolittle and others as yet unknown have committed and are committing offenses involving the transmission, by means of an interstate wire facility, of gambling and wagering information by a person engaged in the business of gambling, in violation of Title 18, United States

Code, Section 1084, and the use of interstate [517] telephone communication facilities for the transmission of betting information in aid of a racketeering enterprise (gambling), in violation of Section 1952 of Title 18, United States Code, and are conspiring to commit such effenses in violation of Section 371 of Title 18, United States Code.

(b) there is probable cause to believe that particular wire communications of Billy Cecil Doolittle and others as yet unknown concerning these offenses will be obtained through the interception, authorization for which is herewith applied for. In particular, these wire communications will concern the interstate transmission of gambling information relating the outcome of professional baseball games and the dissemination of such information to persons engaged in the unlawful business of gambling, and the participants in the commission of said offenses.

(c) normal investigative procedures reasonably appear appear to be unlikely to succeed and are too dangerous to be used.

(d) there is probable cause to believe that the telephones listed to the Sportsman's Club located in the premises of the Sportsman's Club, 222 Third Street, Macon, Georgia, and carrying telephone numbers 912-746-9110, 912-745-2843, 912-745-2844, and 912-745-2845 have been used and are being used by Billy Cecil Doolittle and others as yet unknown [518] in connection with the commission of the above-described offenses.

5. No previous application has been made to any Judge for authorization to intercept or for approval of interception of wire or oral communications involving any of the same persons, facilities, or places specified herein.

WHEREFORE, your affiant believes that probable cause exists to believe that Billy Cecil Doolittle and others as yet unknown are engaged in the commission of offenses involving the transmission of gambling and wagering information by means of an interstate wire facility, by a person engaged in the business of gambling and the use of interstate telephone communication facilities for the transmission of betting infor-

mation in aid of a racketeering enterprise (gambling), and a conspiracy to do so; that Billy Cecil Doolittle and others as yet unknown have used, and are using the telephone listed to the Sportsman's Club, located at 222 Third Street, Macon, Georgia, and bearing numbers 912-746-9110, 912-745-2843, 912-745-2844, and 912-745-2845, in connection with the commission of the above-described offenses; that communications of Billy Cecil Doolittle and others as yet unknown concerning these offenses will be intercepted to and from the above-described telephone; and that normal investigative procedures appear unlikely to succeed and are too dangerous to be used.

On the basis of the allegations contained in this application and on the basis of the affidavit of Special Agent Hart, which is attached hereto and made a part hereof, affiant requests this court to issue an order, pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Investigation of the United States Department of Justice to intercept wire communications to and from the above-described telephones until [519] communications are intercepted which reveal the manner in which Billy Cecil Doolittle and others as yet unknown participate in the illegal use of interstate telephone facilities for the transmission of betting information in aid of a racketeering enterprise (gambling), and which reveal the identies of his confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of fifteen (15) days from the date of that order, whichever is earlier.

/s/ Charles T. Erion
CHARLES T. ERION
Assistant United States
Attorney
Middle District of Georgia

Subscribed and sworn to before me this 21 day of August, 1970.

/s/ W. A. Bootle
United States District Judge

[Footnote continued on page 27a]

[2] [Continued]

AFFIDAVIT OF GARY W. HART

Gary W. Hart, Special Agent, Federal Bureau of Investigation, Macon, Georgia, being duly sworn, states:

1. I am an "investigative or law enforcement officer of the United States" within the meaning of Section 2510(7) of Title 18, United States Code—that is, an officer of the United States who is empowered by law to conduct investigations of and to make arrests for offenses enumerated in Section 2516 of Title 18, United States Code.

2. I have conducted an investigation of the offenses of Billy Cecil Doolittle and, as a result of my personal participation in that investigation and of reports made to me by other agents, I am familiar with all the circumstances of the offenses.

3. A confidential informant who has admitted personal participation in gambling activities, has stated that Doolittle operates a bookmaking operation in the Sportsman's Club, located at 222 Third Street, Macon, Georgia. Doolittle is assisted in his bookmaking operation by Will Sanders who is a full partner. Doolittle obtains the "line" for professional baseball games from an unknown individual by placing a call from a pay telephone booth located in the poolroom of the Sportsman's Club at approximately noon each day, and Doolittle and Sanders thereafter disseminate the "line," accept wagers on professional baseball games, and "lay off" bets through use of several telephones, one of which is numbered 745-2844, located in the "members only" room of the Sportsman's Club which is adjacent to the pool room. Among individuals contacted by Doolittle and his associates in this manner are Cliff Anderson of Columbus, Georgia, and Billy Baxter of Augusta, Georgia.

I have established through independent investigation that this informant has had the opportunity to obtain first-hand knowledge of the activities the informant has described. This informant has been contacted by Special Agents of the Federal Bureau of Investigation [521] on several occasions since January 1970 and on four occasions the informant has furnished information which has been determined to be accurate by independent investigation. On a date during the week

beginning on August 2, 1970, this informant stated that within five (5) days prior to that date through personal observation of Doolittle's activities in the Sportsman's Club, the informant determined that Doolittle is currently operating as described in the preceding paragraph. This informant further stated that through first-hand knowledge the informant knows that Anderson and Baxter are engaged in accepting wagers on the outcome of professional baseball games as of a date during the week beginning on August 2, 1970.

4. A second confidential informant who has admitted personal participation in gambling activities has also stated that Doolittle operates a bookmaking operation in the Sportsman's Club located at 222 Third Street, Macon, Georgia, in a room off the pool hall area of the building. Further, informant states that during the 1970 professional baseball season, Doolittle, assisted by Will Sanders who is a partner, has utilized telephones, one of which is numbered 745-2844, located in this room to facilitate the placing and acceptance of wagers based upon the outcome of professional baseball games. Doolittle is associated with Cliff Anderson of Columbus, Georgia, and Billy Baxter of Augusta, Georgia, and he participates with these individuals, and others unknown, in the placing and accepting of wagers based upon the outcome of professional baseball games. Doolittle is associated with Cliff Anderson games by placing a call from a pay telephone booth located in the Sportsman's Club at approximately noon each day, and subsequently supplies this line to the aforementioned to assist them in the placing and acceptance of wagers based on the outcome of professional baseball games.

[522] I have established through independent investigation that this informant has had the opportunity to obtain first-hand knowledge of the activities the informant has described. This informant has been contacted by Special Agents of the Federal Bureau of Investigation on several occasions since January 1970 and on 22 occasions the informant has furnished information which has been determined to be accurate by independent investigation. On a date during the week beginning on August 9, 1970, this informant stated that within five (5) days prior to that date, through personal conversation with one of the principals at the Sportsman's Club, the

government's wiretap application and supporting affidavit of Special Agent Gary W. Hart, insofar as these materials are illuminative of the question at hand.

Among the features of these materials which convince me that law enforcement officers had probable cause as to Anderson, Baxter, and Sanders are the following: (a) The basis of the application was Hart's affidavit. Repeatedly Hart explicitly refers to a telephone wagering operation conducted over the Sportsman's Club telephone by Doolittle, Anderson, Baxter, and Sanders. (b) Hart avers that these ac-

informant determined that Doolittle is currently operating as described in the preceding paragraph. This informant further stated that through first-hand knowledge the informant knows that Anderson and Baxter are engaged in accepting wagers on the outcome of professional baseball games as of a date during the week beginning on August 9, 1970.

* * * *

6. Examination of the records of the Macon, Georgia, Credit Bureau on April 27, 1970, disclosed that Doolittle and William A. Sanders, Jr., are listed as owners of the Sportsman's Club, Macon, Georgia. Sanders was also listed as a former employee of the Southern Bell Telephone Company for 13 years.

* * * *

/s/ Gary W. Hart
Special Agent
Federal Bureau of
Investigation

Subscribed and sworn before me this 21 day of August, 1970

/s/ W. A. Bottle
United States District Judge

tivities were reported to him by confidential informants, alleged upon Hart's oath to have made declarations against penal interest as indicia of reliability, one of whom is further alleged to have given reliable information on twenty-two prior occasions. (c) The information is quite specific with respect to the players, their roles, certain wagered athletic contests, and the physical setting. (d) Hart avers that this specificity is the product of personal knowledge on the part of the informants, whose personal knowledge Hart swears he has verified through "independent investigation." Without belaboring the point, I simply confess my bemusement that if the Hart affidavit did not provide probable cause as to Anderson, Baxter, and Sanders, I do not know what would. *See* Gonzales v. Beto, *supra*, 425 F.2d at 968-969; *see also* Polanco v. Estelle, 5th Cir. 1975, 507 F.2d 81 ("in judging probable cause magistrates are not to be confined by restrictions on their use of common sense"); United States v. James, 9th Cir. 1974, 494 F.2d 1007; United States v. McHale, 7th Cir. 1974, 495 F.2d 15. Yet, for reasons not entirely apparent to this court, the government saw to it that neither the application nor the order made reference to any of these three defendants.[3]

The government's own statements shed additional light on the issue. When this appeal was briefed, the Supreme Court had not yet decided *Kahn*. At

[3] The district court, in drawing the wiretap order, simply adopted the "others as yet unknown" language used by the government in its application.

that time the government's position was that the term "person, if known," as used in § 2518(1)(b)(iv) and 4(a), meant only the "subject" of the interception, whom the government contended was Doolittle. Not anticipating that the Supreme Court would choose a middle ground between its argument and the "discoverability" test successfully advanced by Minnie Kahn in the Seventh Circuit, the government stated in its brief to this court:

> The application in the present case demonstrated that agents of the government actually "knew," that is had personal knowledge as opposed to information, of only one defendant who was using the phones in question: defendant Doolittle, the person named in the order. They and the Court had nothing more than "probable cause to believe" that Anderson and Baxter [and Sanders] would be intercepted.[4]

Or, I would add, that these three were "committing the offense" for which the wiretap was sought.

Thus, the majority manufactures for the government a result which reflects considerable profit from inconsistent positions, while purging the government's contention of any adverse consequences, however logical or proper they may be. Appellant Anderson argues that in this respect—the government should now be estopped. There may be merit to Anderson's argument, inasmuch as the government was equally as capable as appellants to anticipate what the Supreme Court would hold in *Kahn*. I

[4] Brief for the government at 28-29.

need not rest my views on estoppel, however, since I have already concluded that the requisite probable cause existed as to Anderson, Baxter, and Sanders at the time when tap authorization was sought. Under *Kahn*, therefore, I would reverse as to these three with directions to the district court to suppress their intercepted communications pursuant to 18 U.S.C. § 2518(10)(a)(ii) ("order of authorization or approval under which it was intercepted is insufficient on its face").[5]

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[5] Although the majority does not make this argument in support of its conclusion that Title III was substantially complied with, one might contend that paragraph 4 of the wiretap application, which purports to incorporate the Hart affidavit by reference, operated in legal usage to name Anderson, Baxter, and Sanders insofar as § 2518(1)(b)(iv) required that they be named in the application. One might then argue that since neither the application, the supporting affidavit, nor the order in *Kahn* mentioned Minnie Kahn, and that since the Supreme Court phrased its holding disjunctively in terms of naming a person in the application *or* interception order, the Court implied thereby that the naming of probable cause suspects in *either* the application or the order would satisfy the statute. I may assume that the incorporation by reference operated to name Anderson, Baxter, and Sanders in the application, but I reject the idea that *Kahn* supports or implies the rest of the argument. First, the significant feature of *Kahn* is its emphasis on the literal language and terms of Title III. In addition to requiring, under *Kahn*, the naming of probable cause suspects in the application, Title III literally requires that they also be named in the order. § 2518(4)(a). That was not done in this case, and *Kahn*—inasmuch as it involved no question of half-compliance, through incorporation by reference or otherwise—cannot be deemed to support an analysis which runs counter to the statute's literal provisions. Second, although *Kahn* holds that the district court's duty to include names in the order is no broader than the

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government's duty to include them in the application, the Court explicitly recognized that "[s]ection 2518(4)(a) requires that the order specify 'the identity of the person, if known, whose communications are to be intercepted.'" 415 U.S. at 151, 94 S.Ct. at 982, 39 L.Ed.2d at 234. This part of the Court's discussion does strongly imply a responsibility on the government to see that the names of its probable cause suspects are placed in the court's order—the operative document for initiating a lawful wiretap—as well as the application. This responsibility arises because "the judge who prepares the order can only be expected to learn of the target individual's identity through reference to the original application . . ." *Id.*

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